STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	**1998 OAL Determination No. 6**
Request for Regulatory Determination filed by the OFFICE OF THE CITY ATTORNEY, CITY OF SAN DIEGO, concerning the Job Training Partnership Office Policy/Procedure Bulletin #84-8 issued by the EMPLOYMENT DEVELOPMENT DEPARTMENT	)	**[Docket No. 90-051]**
	)	**June 16, 1998**
	)	**Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
DEBRA M. CORNEZ, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether an Employment Development Department bulletin establishing grievance and hearing procedures under the federal Job Training Partnership Act is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the bulletin is a "regulation," and is required to be adopted pursuant to the APA, except for those portions that merely restate existing law.

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THE ISSUE PRESENTED[1]

The Office of Administrative Law has been requested[2] to determine[3] whether the Job Training Partnership Office ("JTPO") Policy/Procedure Bulletin #84-8, which established state grievance and hearing procedures under the Job Training Partnership Act ("JTPA")[4] and was issued by the Employment Development Department, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[5],[6]

THE DECISION[7],[8],[9],[10]

The Office of Administrative Law finds that:

1. The APA is generally applicable to the Employment Development Department;

2. The challenged procedures of the Policy/Procedure Bulletin ("PPB") #84-8 had general applicability and made specific the terms of the JTPA, federal regulations, and Unemployment Insurance Code sections;

3. No general exceptions to the APA requirements apply to the challenged procedures;

4. The procedures established by PPB #84-8, except those that restate existing law, violate Government Code section 11340.5, subdivision (a).

ANALYSIS

I. BACKGROUND

A. The State Agency

The California Employment Development Department ("Department" or "EDD") provides many services. It acts as a broker between employers and job seekers; pays benefits to eligible unemployed or disabled persons; collects payroll taxes; helps disadvantaged persons to become self-sufficient; gathers and shares information on California's labor markets; administers the Job Training Partnership Act program; and ensures that these activities are coordinated with other organizations that also provide employment, training, tax collection and benefit payment services.[11]

B. This Request for Determination

This request for determination was filed in December 1990, by John K. Riess, on behalf of the Office of the City Attorney, City of San Diego "(requester").[12]

The request for determination challenged EDD's procedures, titled "State Grievance and Hearing Procedures Under the Job Training Partnership Act." These procedures were referred to as the "JTPO Policy/Procedure Bulletin #84-8 dated June 8, 1984," in a memo dated June 18, 1984.[13] Pursuant to this departmental memo, the procedures were issued to: Service Delivery Areas, Private Industry Councils, Program Operators, EDD Job Service Offices, and JTPO Staff. The procedures were dated "May 1984," and issued by the "Job Training Partnership Office,[14] Employment Development Department, State of California."

Page one of the challenged JTPO Policy/Procedure Bulletin #84-8 ("PPB #84-8") states[15]:

> "STATE GRIEVANCE AND HEARING PROCEDURES UNDER THE JOB TRAINING PARTNERSHIP ACT
>
> "The Job Training Partnership Act (JTPA) imposes certain minimum requirements in regard to procedures for handling *noncriminal complaints*

at the State level and Service Delivery Area (SDA) grant recipient level. The particulars of these requirements are stated in Section 629.52 and 629.53 of the [federal] regulations,[16] and Section 144 of the Act (Public Law 97-300: 29 U.S. Code Sec. 1501et seq.). The Governor is responsible for promulgating and implementing policies and procedures *at the State and SDA grant recipient level* for the receipt, investigation, *hearing, and resolution of complaints by JTPA participants, staff, subrecipients, applicants for participation or financial assistance, labor unions, community-based organizations, or any other interested persons.*

"*These procedures must also provide for resolution of complaints arising from actions, such as audit disallowances or the imposition of sanctions*, taken by the Governor with respect to audit findings, investigations or monitoring reports.

"A complaint is defined here as a written expression by a party alleging a violation of the Act, regulations promulgated under the Act, recipient grants, subagreements, or other specific agreements under the Act, *including terms and conditions of participant employment.* All complaints, amendments and withdrawals shall be in writing. *These procedures are intended to resolve matters which concern policies, procedures or action(s) arising in connection with JTPA programs operated by each SDA grant recipient and subrecipient under the Act.* [Emphasis added.]"

Under the heading, "A. GENERAL PRINCIPLES AND RULES," the PPB #84-8 states: "The following principles and rules *apply to all complaints at all steps of the complaint procedures* . . . ."[17] (Emphasis added.) On page four of PPB #84-8, under the heading "B. COMPLAINT PROCEDURES AT THE SDA LEVEL," it provides:

"Pursuant to the JTPA regulations, . . . the Service Delivery Area administrative entities have the responsibility to conduct hearings and resolve complaints made by *individuals* about the administration of programs in the Service Delivery Area. *'SDA level' encompasses SDA administrative entity and all subrecipients and employers* to which the administrative entity has delegated the complaint resolution process. The following comprise the *guidelines* for resolving issues arising in connection with JTPA programs operated by each administrative entity for the SDA. [Emphasis added.]"

On page 8 of the PPB #84-8, the procedures provide:

> "[The JTPA] and the JTPA Regulations ... require the Governor to establish a State review process of complaints filed at the SDA grant recipient level and of complaints initially filed at the State level. The appeal process *is open to all parties in a dispute*. [Emphasis added.]"

Under the heading, "1. Request for Review of SDA Level Decisions,"[18] the procedures set out the requirements for filing a request for review for "all SDA level decisions." Under the heading "2. Request for Hearing at the State Level,"[19] the procedures set out the requirements for requesting a hearing if a decision was not issued at the SDA level as required or if the State has determined an audit disallowance or imposed sanctions.

On March 7, 1997, OAL published a summary of this request for determination in the California Regulatory Notice Register,[20] along with a notice inviting public comment.[21],[22]

C. Rulemaking Authority[23]

The Department has been granted general rulemaking authority pursuant to Unemployment Insurance Code section 305, which states:

> "Regulations for the administration of the functions of the Employment Development Department under this code *shall* be adopted, amended, or repealed by the Director of Employment Development as provided in [the APA]. [Emphasis added.]"[24]

More specifically, regarding the implementation of the JTPA, Unemployment Insurance Code section 15051 provides:

> "The *department shall establish such rules, regulations, and procedures* as are necessary to govern the administration of the provisions of this division [Division 8, titled Family Economic Security: Job Preparation and Training Services] and to assure that the legislative purposes and intent are carried out. The regulations shall include to the extent permitted by federal law:
>
> "(a) Standards and criteria for determining eligibility and services priorities pursuant to section 15011. . . .

"(b) Standards for determining appropriate and allowable services and training activities, and *entities providing services and training*. . . .

"(c) Standards and criteria to be used in developing plans. . . .

"(d) *Standards, criteria, and procedures to be used by the department in evaluating and approving service delivery area plans.*

"(e) Standards for assuring adequate, efficient service delivery area administration including standards for assuring efficient service delivery area management information and financial accounting systems.

"(f) Standards and criteria for assuring effective coordination and linkages with other agencies that deliver training and employment-related services. [Emphasis added.]"[25]

II. DISCUSSION

A. Is the APA Generally Applicable to the Employment Development Department ?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, board, and commission. . . ." [Emphasis added.]

This statutory definition applies to the APA, that is, it helps determine whether a particular "state agency" must adhere to the APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also part of Title 2 of the Government Code: to be precise, Chapter 3.5 of Part 1 of Division 3.

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative

departments of the state government."[26] The Department is in neither the judicial nor legislative branch of state government.[27] Clearly, the Department is a "state agency" within the meaning of the APA.

We also note that Unemployment Insurance Code section 305, quoted above, requires specifically that regulations of the Department "shall be adopted, amended, or repealed . . . as provided in [the APA]."

The Department has not called to our attention and we have not located any statutory provision expressly exempting JTPA-related rules from the APA.

B. Does the Challenged Rule Constitute a "Regulation" Within the Meaning of Government Code Section 11342?

The term "regulation" is defined by Government Code section 11342, subdivision (g), as follows:

> "'Regulation' means every *rule*, regulation, order, *or standard of general application* or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency *to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure* . . . . [Emphasis added.]"

Government Code Section 11340.5, subdivision (a), provides as follows:

> "No state agency shall *issue, utilize, enforce or attempt to enforce any guideline*, criterion, *bulletin*, manual, *instruction*, order, *standard of general application, or other rule*, which is a regulation as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . . [Emphasis added.]"

In *Grier v. Kizer*,[28] the California Court of Appeal upheld OAL's two-part test[29] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

> First, is the challenged rule either:

- a rule or standard of general application, *or*

- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*

- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are guided by the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra,* 22 Cal.3d at p. 204, 149 Cal.Rptr. l, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"[30]

1. First, is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

For an agency policy to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.[31] Just as in *Tidewater Marine Western, Inc. v. Bradshaw*[32] (1996), where the California Supreme Court found a policy to be a rule of general application, the policies and procedures at issue in the matter at hand are expressly "intended to resolve matters which concern policies, procedures or action(s) arising in connection with the JTPA programs operated by *each* SDA grant recipient and subrecipient under the Act"[33] statewide. There is mention of the general application of the procedures throughout the PPB #84-8. (See I., B., above, for general applicability quotations regarding the procedures.)

Therefore, the challenged policies and procedures of PPB #84-8 apply to *all* persons and entities, whether governmental or private, that are involved in JTPA programs.[34]

2. **Second, have the challenged rules been adopted to implement, interpret or make specific the law enforced or administered by the agency or govern the agency's procedure?**

a. **Are the Procedures Provided for in the Policy/Procedure Bulletin #84-8 Required?**

The Department argues that since the service delivery areas are not required to use the procedures set forth in PPB #84-8, then the procedures cannot be considered a rule or order adopted by the Department. Impliedly, the Department is stating that if a rule or order is not mandated or enforced, then the rule or order does not implement, interpret or make specific the law enforced or administered by the agency or that governs the agency's procedures. We disagree.

In its response, the Department states:

> "It is important to understand that the *service delivery areas are not required to use the procedures set forth in the JTPD Policy [PPB #84-8].* Therefore, the JTPD Policy cannot be considered a rule or order adopted by the EDD. To appeal grievances, service delivery areas can use any legal remedies available to them, and *this fact is made explicit in the federal regulations* addressing grievance procedures at the state and local level.
>
> > '(a) .... Nothing contained in this subpart shall be deemed to prejudice the separate exercise of other legal remedies and sanctions available outside the Act. [*sic*]' (20 C.F.R. sec. 627.500(a).)
>
> "The JTPD Policy *provides one method* that the SDAs can use to have complaints reviewed. *This Policy provides the SDAs with an opportunity rather than a mandate they must follow and is not enforced against the SDAs.* [Emphasis added.]"

The Department is not correct in its analysis and application of the federal regulation, subdivision (a) of section 627.500. Section 627.500 is the first section of five sections contained in Subpart E, titled "Grievances Procedures at the State and Local Level." Section 627.500, subdivision (a), states *in full*:

> "(a) *General.* This subpart *establishes the procedures* which apply to the *handling of noncriminal complaints under the Act* at the Governor, the

SDA, and the SSG levels. Nothing contained in this subpart shall be deemed to *prejudice* the *separate* exercise of *other legal rights* in pursuit of remedies and sanctions available *outside* the Act. [Emphasis added.]"

Section 627.500 means that a person is *not be prohibited* from exercising his or her *other* legal rights in pursuit of remedies and sanctions *separate from* those remedies and sanctions available under the Act. EDD's interpretation of section 627.500(a), that the grievance procedures merely provide an alternative method to resolving a complaint *under* the Act, is not correct. Subdivision (d) of section 627.500 allows:

"... Whenever any person, organization, or agency believes that a recipient, an SDA, an SSG, or other subrecipient has engaged in conduct that violates the Act and that such conduct *also* violates a Federal statute *other than JTPA*, or a State or local law, that person, organization, or agency may, with respect to the *non-JTPA* cause of action, institute a civil action or pursue other remedies authorized under such other Federal, State, or local law against the recipient, the SDA, the SSG, or other subrecipient, *without* first exhausting the remedies in this subpart [E]. [Emphasis added.]"

However, subdivision (d) of Section 627.500 mandates that the procedures which apply to the handling of noncriminal complaints *under the Act must be followed.* Subdivision (d) continues:

"Nothing in the Act or this chapter shall:

"(1) Allow any person or organization to file a suit which alleges a violation of the JTPA or regulations promulgated thereunder *without first exhausting the administrative remedies described in this subpart [E]*; or

"(2) Be construed to create a private right of action with respect to alleged violations of JTPA or the regulations promulgated thereunder. [Emphasis added.]"

Furthermore, OAL was unable to find any provisions in the PPB #84-8 procedures that would indicate that the procedures are optional, and not mandated. OAL did find, under the heading "A. GENERAL PRINCIPLES AND RULES," that the procedures state:

"The following principles and rules apply to *all complaints* at *all steps* of the complaint procedures.... [Emphasis added.]"

Also, as a rebuttal to EDD's assertion that the procedures are not mandated, the requester submitted with his comments a document transmitted from EDD to the San Diego Consortium as evidence that the procedures are required. This document is titled "Fraud, Abuse and Grievance Procedure Monitoring Guide." It is not dated, but according to the requester (and not rebutted by EDD), the document was received in February of 1992. It states in part on page one:

"... Also included are questions to help you determine if SDAs have *procedures for resolving non-criminal complaints* (grievances) and are in compliance with section 144(a) and (b) of the JTPA, Section 629.52 and 629.53 of the JTPA Regulations, *and JTPD Policy/Procedure bulletin 84-8.*

"....

"The term 'complaint resolution procedure' is used throughout this Guide to mean the same as 'grievance and hearing procedure'. The former term is used in the attachment to JTPD Policy/Procedure Bulletin 84-8 *which establishes the SDA guidelines for local grievance and hearing procedures.* [Emphasis added.]"

The Department also seems to ignore the plain reading of Government Code section 11340.5, subdivision (a), (quoted above under the heading II., B.) which prohibits a state agency from *issuing* any rule that meets the definition of "regulation" without first complying with the requirements of the APA. The rule does not have to be enforced in order to violate section 11340.5.

The Department's argument and attempt to label the PPB #84-8 procedures as an "alternative method" for reviewing complaints and therefore are not required, is also not persuasive.

State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission) (*"SWRCB v. OAL")* (1993)[35] made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

". . . the . . . Government Code [is] careful to provide OAL authority over

> regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .*" [Emphasis added.][36]

What "label" is given to the rule by the Department and whether the rule is described as "mandatory"[37] are not dispositive on the question of whether a rule is a "regulation." The two-pronged analysis described in *Grier*, above, which defines a "regulation," is the appropriate analysis to determine whether the contents of the challenged documents are subject to the APA.

b. Restatement of Federal Law

The Department further argues that the PPB #84-8 simply restates federal requirements.

> "The JTPD Policy does not meet the legal standard for regulation. This *Policy was adopted in the course of compliance with the federal mandate* that the State establish and maintain a grievance procedure. (29 U.S.C.A. sec. 1554 [footnote omitted].) The federal law provides the time frames for hearings and decisions. (Ibid.) The federal law also specifies that the procedure shall require written notice to interested parties of the date, time, and place of the hearing, an opportunity to present evidence and a written decision. (20 C.F.R. sec. 627.501(b) [footnote omitted].) The JTPD Policy simply repeats these requirements."[38]

The Department asserts that the challenged PPB #84-8 was adopted in the course of compliance with a federal mandate. If the Department is only asserting the federal provisions are the "basis" for the procedures, then the Department is in essence admitting that the procedures are implementing, interpreting or making more specific the federal rules it must enforce. Such supplementary procedures are subject to the APA. However, if the Department intends to argue that the procedures in PPB #84-8 are merely a restatement of the law, rather than the basis for the procedures, then the federal provisions must be examined carefully to determine if the PPB #84-8 procedures depart[39] from the federal provisions.

OAL acknowledges that the PPB #84-8 does contain some provisions that merely restate federal procedures or requirements. OAL agrees with the Department's

examples noted and cited above and in the Department's response, dated May 30, 1997,[40] that those federal provisions are simply restated in the PPB #84-8. However, OAL has also determined that the PPB #84-8 procedures contain several provisions that are not simply restatements of existing law.

The following are examples of regulatory provisions in the PPB #84-8 that depart from or embellish upon existing federal or state law. These examples are not intended to be an exhaustive list of all provisions in the PPB 84#-8 that meet the definition of "regulation"[41]:

1. "All complaints, amendments and withdrawals shall be in writing." (P. 1.)

2. "A complainant may amend his/her complaint to correct technical deficiencies but not to add issues." (P. 2, A., 2.)

3. "Complainants shall have the right to be represented at their own expense by a person(s) of their choosing at all levels of the complaint process." (P. 2, A., 3.)

4. "Official filing date of the complaint is the date the written complaint is received.... The complaint must be in writing and must be signed and dated. The complaint should also contain the following information:

"a. Full name, telephone no., if any, and mailing address of the complainant;

"b. Full name, telephone no. and mailing address of the agency involved (respondent);

"c. Clear and concise statement of facts including dates constituting alleged violation;

"d. Where known, the provisions under the Act, regulations, grant or other agreements under the Act, believed to have been violated;

"e. Remedy sought by the complainant;

"The absence of any of the requested information shall not be a basis for dismissing the complaint.

"A copy of the complaint must be sent to the respondent and both parties notified of the opportunity for an informal resolution. At each step of the complaint process, the complainant must be notified in writing of the next procedural step."

[The PPB #84-8 continues with notice requirements under the heading "2. Notice of Hearing."]

"The complainant and the respondent must be notified in writing of the hearing ten (10) calendar days prior to the date of hearing. The ten-day notice may be shortened with the written consent of the parties...." (Pp. 4 - 5, B., 1. and 2.)

OAL was unable to find or determine that the above procedures and requirements were restatements of existing law. Though the Department did provide examples where certain procedures merely restate federal statute or regulation, the Department has failed to demonstrate that *all* elements of the departmental procedural guidelines do no more than restate existing, duly adopted provisions of law.

Clearly, the state grievance and hearing procedures set forth in PPB #84-8 are rules implementing and making specific the federal JTPA and federal JTPA regulations, and are therefore "regulations" subject to the requirements of the APA, except for those procedures and provisions which restate existing law without further embellishment upon, or departure from, the JTPA, federal regulations or state law.

C. Do the Challenged Rules Found to be "Regulations" Fall Within Any Established *General* Exception to APA Requirements?

All "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute,[42] as discussed above, or unless the conditions of a general exception are met.[43] The Department argues that "Even if the JTPD Policy meets the definition of a regulations, the JTPD Policy satisfies two of the exceptions to the [APA]." These two exceptions will be addresssed below.[44]

1. Specifically named persons

An exception in Government Code Section 11343, subdivision (a)(3), exists for a rule which is "directed to a specifically named person or to a group of persons *and [which] does not apply generally throughout the state.*"

The challenged PPB #84-8 was attached to a memo directed to "Service Delivery Areas, Private Industry Councils, Program Operators, EDD Job Service Offices, and JTPO Staff." The Department argues that:

> "... SDAs and private industry councils operate as one unit. The JTPD Policy is directed towards specifically named groups of persons."
>
> "....
>
> "... The number of service delivery areas is fixed. SDA designations may only be changed by the Governor and a fixed number of 52 SDAs have been designated by the Governor. (29 U.S.C.A. sec. 1511.)"[45]

If OAL were to accept the Department's argument that the group of persons listed on the memo fell within the "specifically named person or to a group of persons" exemption, then to issue a memo to "All California Residents" would also qualify as a "specifically named person or group of persons." However, that is clearly not the intended meaning of the exemption. For example, a "specifically named person" could be "John Brown" or "Pacific Gas & Electric, Co." A "specifically named ... group of persons" could be "Tom Jones, Bob Smith and Jane Doe."

Also, in its argument, the Department ignores the second part of Government Code section 11343, subdivision (a)(3) which states "... *and does not apply generally throughout the state.*" (Emphasis added.) Clearly, as determined in the discussion above, the PPB #84-8 contains "State Grievance Hearing Procedures Under the Job Training Partnership Act," which applies generally throughout the state to all 52 SDAs, as well as to all the other entities listed in the cover memo, *and* to all JTPA program participants, subrecipients, and employers as instructed by the PPB #84-8.[46]

In response to the Department's argument that "[t]he number of service areas is fixed," OAL notes that 29 U.S.C. section 1511 does *not* limit the number of SDAs that the Governor can designate. Section 1511 states in part:

> "(a) Proposals; proposed designation; requests

(1) The Governor shall ... publish a proposed designation of service delivery areas for the State ....

"....

(4)(A) The Governor shall approve *any* request to be a service delivery area from--
(i) any unit of general local government with a population of 200,000 or more;
(ii) any consortium of contiguous units of general local government with an aggregate population of 200,000 or more which serves a substantial part of one or more labor market areas; and
(iii) any concentrated employment program grantee for a rural area which served as a prime sponsor under the Comprehensive Employment and Training Act.

"(B) The Governor may approve a request to be a service delivery area from *any* unit of general local government or consortium of contiguous units of general local government, without regard to population, which serves a substantial portion of a labor market area.

"(C) ....

"(b) ....

"(c) Redesignations

"(1) In accordance with subsection (a) of this section, the Governor *may redesignate service delivery areas no more frequently than every two years* .... [Emphasis added.]"

As can be seen, section 1511 allows for the "class" of SDAs to change. The Department even admits that the SDA designations may be *changed* by the Governor.[47]

Hence, the Department's argument that the PPB #84-8 is exempt from the requirements of the APA fails because PPB #84-8 is *not* directed to a specifically named person or to a group of persons, but is directed to several groups, whose membership is not fixed (i.e., open class) and it *does apply generally* throughout

the state. Furthermore, the challenged PPB #84-8 procedures directly affect other people beyond those listed on the June 18, 1984 cover memo, e.g., all JTPA program participants, subrecipients, and employers, which are groups not listed on the cover memo, but are designated in the PPB #84-8 as being those people who are subject to, and must comply with, the challenged procedures.

2. Contracts

The Department makes the argument that the PPB #84-8 is simply part of its master subgrant contract between EDD and the San Diego SDA (and presumably with all 52 SDAs). EDD included copies of its master subgrant with San Diego SDA for the period covering July 1, 1990 through June 30, 1991 (the time period covering the date when the request was filed) and the current master subgrant between EDD and San Diego SDA with its argument. In the "General Provisions" section of both of these subgrant agreements it states:

> "In performance of this agreement, Subgrantee will fully comply with:
>
> > 1. The provisions of the JTPA and all regulations, directives, policies, procedures and amendments issued pursuant thereto and/or legislation, regulations, policies, directives, and/or procedures which may replace JTPA;..."

The Department makes the argument that this general provision incorporates into the contract agreement all "directives, policies, procedures and amendments thereto" that the Department may issue pursuant to the JTPA. Implicit in the Department's argument is the proposition that "underground regulations" are shielded from APA challenge by inclusion into a contract. They are not.

Provisions of a contract, which are rules of general applicability interpreting a statute (or a regulation), are not shielded from APA challenge. There is no express statutory language which provides that agency rules placed in contract provisions are exempt from the APA. Applying Government Code section 11346, which requires that exemptions be expressly stated in statute, OAL presumes that no such exemption exists.

In addition, it appears the Legislature intended that there be no exemption for contract provisions. Exempting public contracts was--and is--a clear policy alternative. The federal APA first enacted in 1946, exempted "*matter relating to*

agency management or personnel or to public property, loans, grants, benefits or *contracts*" (emphasis added) from rulemaking requirements.[48] In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "any interpretative rule *or any rule relating* to public property, public loans, public grants or *public contracts*" (emphasis added) from APA notice and hearing requirements.[49] It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting rules contained in public contracts from notice and comment requirements.

Perhaps the California Legislature reasoned that providing an exemption for contract provisions would not be consistent with the basic goals of the APA, e.g., to provide for meaningful public participation in agency decision making. The APA provides that all parties affected by proposed rulemaking be given the right to hearing and an opportunity to comment on the proposed rules. The right to comment would be nullified if an agency were permitted to avoid formal adoption of a rule by merely incorporating it into a contract. While the rights of parties to a contract may be limited by the terms of the contract, it is inherently unjust for such terms to restrict the rights of parties not subject to the contract.[50]

In the matter at hand, the procedures contained in the PPB #84-8 govern the state grievance and hearing procedures under the JTPA throughout the state. As discussed above, the procedures not only affect SDAs, but also directly affect JTPA participants, subrecipients, and employers, who are not parties to the contract.

The Department's analysis of *Roth v. Department of Veterans Affairs* (1980)[51] does not support its argument. In *Roth*, the court addressed the validity of the Department's charging late fees to homebuyers when the contracts for the purchases of farms and homes did not specifically provide for a late charge. The trial court entered judgment in favor of the Department. The Court of Appeal reversed the lower court judgment and noted that the Department's practice was a rule of general application that needed to be adopted pursuant to the APA.[52]

The Department argues that the facts in the matter at hand are quite different from the facts in *Roth*:

> "The SDA is a party to an agreement that binds the SDA to comply with the JTPD policies. [Par.] The strong implication from the *Roth* case is that a rule that is established in a contract can be enforced through the contract.

Since the San Diego SDA subgrant establishes that the SDA has specifically agreed to follow JTPA policies, the State could enforce JTPA policies on the basis of the contract."[53]

OAL disagrees with the Department's argument. The decision of the *Roth* court was based on the analysis of what the language "of general application" means and found the trial court in error in its finding that the late charge provision was not a rule, regulation, order or standard of general application. The defendant in the *Roth* case had argued that the late charge was not a standard of general application because it did not apply to all the citizens in the state. The *Roth* court ruled:

> "... This is, we believe, an overly broad reading of the words 'of general application.' ... [T]he word 'general' means pertaining to all of the members of a class, kind, or order. For a rule of a public entity to be 'of general application,' it does not have to apply to all the citizens of the state."[54]

The *Roth* court based its decision on its analysis of the meaning "of general application," not whether the challenged rule was part of a contract agreement. A stronger implication of *Roth* is that if a rule is a standard of general application, then that rule would meet the definition of "regulation," regardless if it is part of an agreement or not, and therefore should be adopted pursuant to the APA.

That is not to say that a specific agreement, or that all provisions in such an agreement must meet the requirements of the APA. In fact, each specific agreement with a specific entity to cover specific proposals probably does fall within an exception. However, that is not the issue presented. The issue in this Determination is whether state grievance and hearing procedures of PPB #84-8, implementing and making specific the JTPA, which *all* agreements, statewide, must meet must be adopted pursuant to the APA. OAL has determined that the answer to this question is clearly "yes," except for those procedures and provisions that merely restate existing law.

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

1. The APA is generally applicable to the Department.

2. The challenged procedures of PPB #84-8 had general applicability and made specific the terms of the JTPA, federal regulations and Uemployment Insurance Code sections;

3. No general exceptions to the APA requirements apply to the documents;

4. The procedures established by PPB #84-8, except those that restate existing federal or state law, violate Government Code section 11340.5, subdivision(a).

DATE: June 16, 1998

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ENDNOTES

1. The legal background of the regulatory determination program --including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations) (see endnote 3: *Grier* disapproved on other grounds in *Tidewater*).

In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11340.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

In June 1998, a *seventh* survey of governing law was published in **1998 OAL Determination No. 4** (Department of Fish and Game, June 26, 1998, docket No. 90-049), California Regulatory Notice Register 98, No. 26-Z, p. __, note 1.

2. This request for determination was filed by John K. Riess, who filed the request for the Office of the City Attorney, City of San Diego, City Administration Building, 202 "C" Street, San Diego, CA 92101-3863, (619) 236-7215. Mr. Riess is now in private practice at 3579 Lomacitas Lane, Bonita, CA 91902, (619) 475-0256. The Employment Development Department responded to the request and was represented by Vera Sandronsky, Staff Counsel III, 800 Capitol Mall, P. O. Box 826880, Sacramento, CA 94280-0001, (916) 653-0707.

Comments were received from the requester and responses were received from the Department pursuant to the Notice published in the California Regulatory Notice Register (CRNR) 97, No.10-Z, March 7, 1997, p. 544.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

4. The "Job Training Partnership Act" means "Public Law (Pub. L.) 97-300, as amended, 29 U.S.C. 1501, et seq." (20 CFR 626.5.) The federal regulations (20 CFR 626.1) describe the scope and purpose of the Job Training Partnership Act (JTPA) as follows:

"It is the purpose of the [JTPA] to establish programs to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased educational and occupational skills, and decreased welfare dependency, thereby improving the quality of the work force and enhancing the productivity and competitiveness of the Nation ([Pub. L. 97-300,] section 2)."

5. This determination may be cited as "**1998 OAL Determination No. 6.**"

6. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

7. The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*). Prior to this court decision, OAL had been requested to determine whether this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]'

[Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [Id.; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384 (reasons for according due deference consideration to OAL determinations).

8. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

9. Pursuant to Title 1, CCR, section 127, this determination shall become effective on the 30th day after filing with the Secretary of State. This determination was filed with the Secretary of State on the date shown on the first page of this determination.

10. Government Code section 11340.5, subdivision (d) provides that:

> "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published."

11. The duties and services performed by the Department are set out in the Unemployment Insurance Code, sections 1 through 17002.

12. Government Code section 11340.5 states in part:

> "(b) If the [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the [OAL] may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.
>
> "(c) ....

"(d) Any *interested person* may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside .... [Emphasis added.]"

Title 1, CCR, section 121, subsection (b) defines "Request for determination" as meaning "a request made by *any person* to OAL, in accordance with the procedures specified in this article, to issue a determination as provided by Government Code Section 11340.5, as to whether a state agency rule is a 'regulation,' as defined in Government Code Section 11342(g)." (Emphasis added.)

Government Code section 11340.5 and Title 1, CCR, section 121 allow *anyone* to bring to OAL's attention a rule that has not been adopted pursuant to the APA by filing a request for determination. The law does not require a person to be an "interested person" and therefore, any person would have standing to file a request for determination with OAL. Furthermore, the two laws set forth above do not require that a person be "harmed" before the person can file a request for determination. The "standing" and "harm" issues discussed by both the requester and the Department need not be addressed any further in this determination proceeding.

13. This JTPO Policy/Procedure Bulletin #84-8, containing "State Grievance and Hearing Procedures Under the Job Training Partnership Act," is the only challenged rule subject to OAL's determination under the matter at hand. Subsequent documents ("Fraud, Abuse and Grievance Monitoring Guide" and "Status of JTPA Directives and Policy'Procedure Bulletins, August 29, 1983 through June 30, 1996") submitted by the requester as attachments to his May 16, 1997 comments were not considered as additions to the challenged rule in this request for determination, but were considered only as part of the requester's comments.

14. According to the Department's response, dated April 21, 1997, the Job Training Partnership Office is now called the Job Training Partnership Division. To avoid confusion, the determination will refer to the Job Training Partnership Office since that is the name used in the challenged procedures.

15. To assist in the understanding of terms quoted from the challenged PPB #84-8, the following definitions are provided:

"Governor" means "the recipient of JTPA funds awarded to the State under titles I through III." [20 CFR 626.5.]

"Recipient" means "the entity to which a JTPA grant is awarded directly from the Department of Labor to carry out the JTPA program.... For JTPA grants under titles I, II, and III, except for certain discretionary grants awarded under title III, part B, the State is the recipient." [20 CFR 626.5]

"Service delivery area" or "SDA" means "a service delivery area designated by the Governor pursuant to [the JTPA].... SDA may also refer to the entity that

administers the JTPA program within the designated area." [20 CFR 626.5.]

"Units of general local government with populations of 200,000 or more and consortia of contiguous units of local government with an aggregate population of 200,000 or more which serve a substantial part of a labor market area shall be designated service delivery areas, if they so request. Furthermore, consideration shall be given to service delivery area requests from any unit of general local government, with a population level below 200,000, which served as a prime sponsor under the Comprehensive Employment and Training Act." [Unemployment Insurance Code section 15005.]

"Subrecipient" means "the legal entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided. For JTPA purposes, distinguishing characteristics of a subrecipient include items such as determining eligibility of applicants, enrollment of participants, performance measured against meeting the objectives of the program, responsibility for programmatic decisionmaking, responsibility for compliance with program requirements, and use of the funds awarded to carry out a JTPA program or project, as compared to providing goods or services for a JTPA program or project (vendor)...." [20 CFR 6256.5.]

16. The federal regulations cited in the Policy/Procedure #84-8 have been renumbered. See 20 CFR 627.500 through 627.504. The current citations will be used in the determination.

17. PPB #84-8, p. 2.

18. PPB #84-8, p. 8.

19. PPB #84-8, p. 10.

20. California Regulatory Notice Register ("CRNR") 97, No. 10-Z, [March 7, 1997], p. 544.

21. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

22. Due to an inadvertent error, the Notice of Active Consideration, dated March 13, 1997, was not mailed to either the requester or the Department in a timely manner. (Tit. 1, Calif. Code Regs., sec. 123, subs. (d).) The Department, on its own, became aware of the publication of the summary of the request for determination and submitted a timely response to OAL on April 21, 1997. A Notice of Active Consideration, via letter dated May 6, 1997, was mailed to Mr. Riess and the Department. Mr. Riess was provided a 10-day period in which to submit any public comments. Mr. Riess did submit a public comment, dated May 16, 1997. The Department was also provided an opportunity to submit any additional comments to OAL in response to the comments submitted by Mr. Riess. The Department submitted additional comments, dated May 30, 1997.

Subsequent to the Department's additional comments, Mr. Riess submitted further comments, dated June 17, 1997. OAL decided to consider Mr. Riess' comments and gave the Department the opportunity to submit any response to these comments. Also, in light of a recent appellate court decision, *Private Industry Council v. Employment Development Department*, (1997) 57 Cal.App.4th 1290, 67 Cal.Rptr.2d 669 (uncodified EDD directive regarding the allocation of funds under the JTPA program was challenged as being in conflict with the JTPA and for noncompliance with the APA; the uncodified directive was declared to be invalid because it violates the JTPA, the APA issue was not reached), OAL gave both the requester and the Department the opportunity to submit any view they might have on the relevance of this case to the determination. The requester submitted his views, dated April 16, 1998, and the Department submitted its view, dated April 17, 1998, on the relevancy of the *Private Industry Council* case, and also included the Department's response to Mr. Riess' June 1997 comments.

23. *OAL does not review alleged underground regulations for compliance with the APA's six substantive standards.*

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a request for determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.)

OAL's specific authority under Government Code Section 11340.5 (underground regulations) under which this request has been submitted for OAL's consideration, limits OAL review to whether the state agency must follow the requirements of the rulemaking portion of the APA before issuing the documents.

In the event regulations were issued by the Department under the APA, OAL would review the proposed regulations. The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed

for formal adoption.

The question of whether a challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to OAL under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

24. Unemployment Insurance Code section 305 requires the Director of Employment Development to adopt, amend, or repeal EDD regulations "... as provided in Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code."

Section 2 of Statutes 1979, chapter 567, amended by Statutes 1980, chapter 204, section 7, provided:

> "Chapter 4.5 (commencing with Section 11371) of Part 1, Division 3, Title 2 of the Government Code is repealed.
>
> "Any reference in any statute of this state to Chapter 4.5 (commencing with section 11371) of Part 1, Division 3, Title 2 of the Government Code shall be deemed to be a reference to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

25. The court in *Private Industry Council of Southeast Los Angeles, Inc. v. Employment Development Department* (1997) 57 Cal.App.4th 1290, 67 Cal.Rptr.2d 669 stated:

> "Respondent Employment Development Department (EDD) is the state agency charged with the duties of establishing regulations for implementing the JTPA (Unemp. Ins. Code sec. 15051) .... [*Id.*, at p. 670.]"

26. Government Code section 11342, subdivision (a).

27. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

28. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

29. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make

specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.) (See endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

30. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

31. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

32. 14 Cal.4th 557, 572, 59 Cal.Rptr.2d 186, 195.

33. PPB #84-8, p. 1.

34. The holding in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572, 59 Cal.Rptr.2d 186, 195 applies here. In *Tidewater,* maritime employees challenged a policy of the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations enforcing a properly adopted regulation (wage order) of the Industrial Welfare Commission (IWC). The court held that the "policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment." The court found that the policy was void because APA procedures were not followed. Also see **1993 OAL Determination No. 5,** (State Personnel Board, December 14, 1993, Docket No. 90-020) CRNR 94, 2-Z, January 14, 1994, p.61 at p.71.

The *Tidewater* court also addressed the issue of case by case adjudication and disapproved *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239,252-253, 211 Cal.Rptr. 792 and *Bono Enterprise, Inc. v. Commissioner* (1995) 32 Cal.App.4th 968,978-979, 38 Cal.Rptr.2d 549 insofar as they were inconsistent with *Tidewater.* The court in *Tidewater* distinguished true case by case adjudications applying a regulation to a particular case as in *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal.3d 465, 158 Cal.Rptr. 882, from cases in which the agency applies a blanket interpretation memorialized in a policy manual, intending to apply it in all cases of a particular class or kind. *Tidewater,* 59 Cal.Rptr.2d at 196. Before taking several case by case adjudications and stating a rule learned from them to be applied in the future, an agency must go through the APA process.

The *Tidewater* court found that:

"A written statement of policy that an agency intends to apply generally, that is

unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (59 Cal.Rptr.2d at 197.)

The court found that the Legislature, not the court, should state when agencies should be free to adopt so-called "interpretive regulations" without following the APA.

Finally, the court refused to give deference to the DLSE's interpretation of the IWC wage orders because in effect that would "permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither." *Tidewater,* 59 Cal.Rptr.2d at 198 citing *Armistead* 22 Cal.3d 204.

35. 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

36. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

37. Whether a "rule" is "binding," "mandatory" or "advisory" makes no difference to the legal analysis if the rule otherwise meets the two-prong test -- is it applied generally and does it implement, interpret or make specific the law. For further discussion see **1986 OAL Determination No. 2,** pp. 11-13 (third argument) (California Coastal Commission, April 30, 1986, Docket No. 85-003), CANR 86, No. 20-Z, May 16, 1987, p. B-31, **1986 OAL Determination No. 3,** pp. 9-13, 17, (State Board of Equalization, May 28, 1986, Docket No. 85-004), CANR 86, No. 24-Z, June 13, 1986, p. B-10, **1994 OAL Determination No. 1** (thorough discussion of specific parts of "advisory" letters, some of which were determined to be "regulations" and some of which were determined not to be "regulations"), pp. 33-38, 46, 56 (State Department of Education, December 22, 1994, Docket No. 90-021) CRNR 95, No. 3-Z, January 20, 1995, p. 95.

38. Department's Response, dated April 21, 1997, p. 2.

39. *Engelmann v. State Board of Education* (1991) 2 Cal.App.4 49, 63, 3 Cal.Rptr.2d 264, 274.

40. At p. 2, the Department asserts:

> "The applicable federal regulations and statute establish the key elements of Policy/Procedure Bulletin #84-8 re: State Grievance and Hearing Procedures Under the Job Training Partnership Act (the JTPD Policy). For example, the statement in the JTPD Policy that complaints, except those alleging fraud or criminal activity, must be filed within one year of the alleged occurrence comes from the federal statute. (The JTPD Policy, p. 2; 29 U.S.C.A. sec 1554(a).) The statement in the JTPD Policy that decisions shall be issued within 60 days of filing a complaint also comes from the federal statute. (The JTPD Policy, p. 4; 29 U.S.C.A. sec. 1554(a).) The statement in the JTPD Policy that a complainant has the right to rquest a review of the complaint by the Governor if the complainant does not receive a decision at the service delivery area level within 60 days of

filing the complaint, or receives an unsatisfactory decision, comes from a federal regulation. (The JTPD Policy, p. 3; 20 C.F.R. sec. 627.503(a).) In addition to those I have identified, there are many other examples of statements in the JTPD Policy that simply repeat the rules found in the governing federal law."

41. PPB #84-8, pp. 8-12, sets forth the procedures for requesting a review of an SDA level decision and for requesting a hearing at the state level. While some of these procedures seem to restate existing law, there appears to be several provisions that further implement, interpret or make specific the federal law administered by the Department. The following are examples of provisions not found or identified by the Department as restatements of existing law:

1. The specific information required to be included when filing a request for review or when filing a request for a hearing was not found in existing law.

2. It is the SDA's responsibility to submit a complete record including a typed record of the hearing to the Chief, JTPO, within 10 days.

3. The notice to the parties concerned and the SDA shall be received at least 5 calendar days before the scheduled hearing.

4. The request for a State hearing shall be filed within *10* days after the SDA should have issued a decision. [OAL notes that 20 C.F.R. section 627.503, subdivision (c) provides "A request for review shall be filed within 10 days of receipt of the adverse decision or, if no timely decision is rendered, within *15* days from the date on which the complainant should have received a timely decision." (Emphasis added.)

42. Government Code section 11346.

43. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating *only* to the internal management of *the* state agency. (Gov. Code, sec. 11342, subd. (g).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)

c. Rules that "[establish] or [fix] *rates, prices,* or *tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest) ("*San Joaquin*"); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6,** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 168-169, 175-177, 197-200. Relying in part on *Grier v. Kizer*, 268 Cal. Rptr. at 253, **1991 OAL Determination No. 6** rejected DDS' contention (which had been based on *San Joaquin*) that a contractual provision cannot be a standard of general application for APA purposes. The primary APA holding of *San Joaquin* was that a "statistical accounting technique" can never be a "regulation" within the meaning of the APA; a possible secondary holding was that a contractual provision previously agreed to by the complaining party is not subject to the APA. *Grier v. Kizer*, upholding **1987 OAL Determination No. 10,** expressly rejected the primary *San Joaquin* holding, noting that this holding appeared to have lost its precedential value due to the subsequent, inconsistent Supreme Court decision in *Armistead.*

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless *first* necessary to determine whether the challenged agency rule meets the two-pronged "regulation" test: *if* an agency rule is *either* not (1) a "standard of general application" *or* (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," *then* there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, the Court followed the above two-phase analysis. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 571, 59 Cal.Rptr.2d 186, 194, reaffirmed use of the *Grier* two prong test and relied upon *Union of American Physicians* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 89 and *Roth* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552, for its further interpretation.

44. There is nothing presented in the record that would indicate that the exception for internal management rules, forms, rates, prices or tariffs, or legal opinions of tax counsel (see endnote 43, paragraphs a., b., c., and e.) could apply here. For that reason, these exceptions are not addressed.

45. Department's response, dated April 21, 1997, p. 4.

46. See PPB #84-8, pp. 1, 2 and 4.

47. Department's response, dated April 21, 1997, p. 4.

48. Title 5, U.S.C. section 553(a)(2).

49. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt public contracts from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.

50. **1991 OAL Determination No. 6,** p. 176 (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR 91, No. 43-Z, October 25, 1991, p. 1451.

51. 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

52. *Id,* at pp. 629-630, at p. 556.

53. Department's response, dated April 21, 1997, p. 5.

54. *Roth, supra,* 110 Cal.App.3d 622, 629-630.